

U.S. Department of Labor

**Office of Administrative Law Judges
2600 Mt. Ephraim Avenue
Camden, NJ 08104**

**(856) 757-5312
(856) 757-5403 (FAX)**



DATE: September 23, 1999

CASE NO.: 1999-STA-00009

In the Matter of

SEAN FOUNTAIN

Complainant

v.

P & T CONTAINER SERVICE
SUBSIDIARY OF USA WASTE SERVICES, INC.

Respondent

Appearances:

Michael F. Mimno, Esquire
For the Complainant

Paul R. Keane, Esquire
For the Respondent

Before:

Lawrence P. Donnelly
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982, 49 U.S.C. §2305 (the Act), and the regulations promulgated thereunder, 29 C.F.R. Part 1978.

Complainant, Sean Fountain, filed a timely complaint with the Secretary of Labor on April

24, 1998 alleging that the Respondent, P & T Container Service (P & T), discriminated against him in violation of Section 31105 of the Act. The Secretary, acting through her duly authorized agents, investigated the complaint and determined that there is reasonable cause to believe that the Respondent did not violate Section 31105 of the Act. By letter dated October 26, 1998 the Secretary notified the Complainant that she had determined his complaint had no merit and that his complaint had been dismissed. (ALJX-1)¹ By letter from his attorney received on November 16, 1998 the Complainant objected to the Secretary's findings in this matter and requested a hearing on his complaint. (ALJX-2) By agreement of the parties the hearing in this matter, originally scheduled to be held in December 1998 was rescheduled for March 10 and 11, 1999. (ALJX-3, 4) The Complainant's Brief and Proposed Order was received in this office on April 16, 1999. The Respondent's requests for Findings of Fact and Rulings of Law were received in this office on April 23, 1999 and the record was closed. The findings of fact and conclusions of law as set forth in this decision are based upon a thorough review of the testimony, evidentiary record and consideration of the written arguments of the parties.

Issue:

Whether or not P & T Container Service terminated Sean Fountain's employment because of Mr. Fountain's involvement in an activity protected by the Act.

Findings of Fact:

1. The Complainant, Sean Fountain, filed a complaint with the Secretary of Labor pursuant to the Surface Transportation Assistance Act of 1982 (the Act), (49 U.S.C. 31105). The Complainant alleged that the Respondent, P & T Container Service, a subsidiary of USA Waste Services, Inc., discriminatorily discharged him for refusing to drive a truck because it had mechanical problems which affected the safety of the vehicle.

2. The complaint was investigated by the Secretary of Labor, through her authorized representative, Acting Regional Administrator Cindy A. Coe of the Occupational Safety and Health Administration (OSHA).

3. On October 26, 1998, after investigation of Sean Fountain's complaint, Acting Regional Administrator Coe entered the Secretary's Findings and determination that there is reasonable cause to believe that the Respondent did not violate Section 31105 of the Act. (ALJX-1)

4. After Acting Regional Administrator Coe's investigation of Sean Fountain's complaint, she concluded: "this case is found to be without merit and is herewith dismissed."

5. On November 12, 1998 the Complainant filed his Notice of Objections to the Secretary's

¹ALJX refers to Administrative Law Judge's Exhibit; CX refers to Complainant's Exhibit, RX refers to Respondent's Exhibit; TR refers to the Transcript of Proceedings.

Findings pursuant to 49 U.S.C. §31105(b)(2)(B). On March 10 and 11, 1999, a hearing was conducted on Sean Fountain's complaint at the U.S. Department of Labor, Office of Administrative Law Judges in Boston, Massachusetts.

6. Beginning in 1993 Sean Fountain worked for the Essex County Sheriff's Office as a corrections officer at the Essex County House of Correction and he worked there until he was laid off in August 1997.

7. Sean Fountain began driving waste disposal trucks for the Canelas Company (Canelas) in October 1997 and continued working for Canelas until early 1998 when the Canelas operation was purchased by P & T Container Service, the Respondent.

8. After the takeover of Canelas by P & T, the Complainant continued his duties as a driver of trash trucks and he received an increase in his hourly rate from \$11.00 to \$11.50.

9. The Complainant continued driving for the Respondent until April 21, 1998 when he alleges, he was fired by his supervisor at P & T because he refused to drive P & T trucks numbered 136 and 138 which he deemed to be unsafe.

Testimony of Sean Fountain:

Sean Fountain testified that he was born on June 5, 1972 and that he graduated from high school in 1990. He attended community college for one year after high school and took additional classes in criminal justice at the community college up until 1994. He was employed as a corrections officer for the Essex County Sheriff's Department. He started with the sheriff's department in 1993 and was laid off due to budgetary considerations in 1997. He returned to work for the sheriff's department in August 1998, he believes, and he has been working there regularly since then. He has a Massachusetts CDL license, class B, which he obtained in May 1997 after undergoing testing. The CDL-B license authorizes him to operate vehicles up to 33,000 lbs. gross vehicle weight such as the vehicles in the Canelas Company and P & T Container Service fleets of vehicles. He went to work for the Canelas Company in October 1997 as a driver of ten wheel, rear-load trash trucks. He worked full time and was paid eleven dollars an hour and after 30 days on the payroll he was covered by the company health insurance plan. He continued to be employed by the Canelas Company until the owners sold the company to P & T Container Service in January 1998. (TR 56-65)

Mr. Fountain testified that he continued his duties as a trash truck driver after P & T took over what had been the Canelas Company fleet of trucks. Toward the end of January 1998 his pay was increased to \$11.50 an hour and he became covered by the P & T health insurance plan. He began reporting for work in the mornings at the P & T facility in Haverhill at about 6:00 A.M., although he and the other drivers did not begin their day for pay purposes until 6:30 A.M. His supervisor at P & T was John Apostolides whom he would usually see every morning when he reported to work at P & T. When he arrived at work he obtained his route sheet for the day from the office, found out what truck and laborer he had been assigned and got the vehicle condition report (VCR) book before going to check out his assigned truck. The check involved is called a circle check which requires a visual walk around inspection of the vehicle as well as a hands on inspection of the

safety equipment such as brakes, lights and tires. If such inspection revealed a mechanical problem he would inform his supervisor or a mechanic about it and note the problem on the VCR. If it was a minor problem it would be fixed right away but if it would take some time to correct or to obtain parts to repair he was frequently advised to drive the truck anyway. After driving and completing his daily assigned route he would return to the P & T facility, do a post-trip inspection of the vehicle, complete and turn in his paperwork, punch out on the time clock and go home. (TR 65-74)

Sean Fountain testified that on the day in question, April 21, 1998, he arrived at the P & T facility between 5:45 A.M. and 6:00 A.M. He then went into the office to find out what his assigned route and assigned truck were to be for the day. Upon being told by John Apostoledes that he was to drive truck 136 that day he declined because he believed that truck to be unsafe based on his knowledge of the background of that vehicle and its condition of disrepair. Mr. Apostoledes then told him he could drive truck 138 that day but he declined to drive that truck also because of his knowledge of mechanical problems with that truck and because it had been in an accident a few days before. John Apostoledes became exasperated with him because of his refusal to drive either truck 136 or truck 138 stating: "I don't need you here. You'll drive what truck I tell you to. If I want to make you labor, I'll make you labor." Mr. Apostoledes was yelling and swearing at him but did tell him to check out the condition of truck 151. He checked out that truck and found a few minor problems but it was in better condition than the two other trucks he had been assigned to drive that day. He told Mr. Apostoledes about the results of his inspection of truck 151 and the problems he had observed. Mr. Apostoledes once more began to verbally berate him telling him what he had said after he had declined to drive trucks 136 and 138. Nevertheless, Mr. Fountain said since he was already there at work he drove truck 151 out of the P & T yard and proceeded to do his assigned route that day. (TR 87-92)

Sean Fountain stated that he returned to the P & T yard after completing his assigned route on April 21, 1998. He filled out his route sheet, looked over the truck again writing down the problems he noted, filled out the post-trip VCR and then took his paperwork into the office that afternoon. He encountered John Apostoledes inside the office as well as other employees he did not know by name and two men that he did recognize, Dave Hopping and Paul Runlet. He informed John Apostoledes that truck 151 had problems also. Mr. Apostoledes told him, among other things: "As far as I'm concerned you don't even need to come back here anymore. I don't need you here anyway." Mr. Apostoledes was yelling so he left the office and walked out to the front gates because he did not wish to be involved in another argument with John. He did not return to the P & T facility the next day because it was his impression that he had been fired. John Apostoledes had told him not to come back and that he was not needed there, meaning to him that he had been fired. Furthermore, he believed that he had been fired because he had refused to drive two trucks that were unsafe and because John Apostoledes was tired of him writing up safety problems with the vehicles which P & T did not want to deal with. (TR 93-98)

Michael C. Doyle, a Massachusetts state trooper assigned to the commercial vehicle enforcement section for truck safety, testified that his duties include stopping trucks, inspecting them, weighing them and checking the drivers. (TR 30, 31) Trooper Doyle said that during the period

January 1998 through April 1998 he had occasion to stop P & T trucks to inspect them, weigh them and, if found unsafe, place the vehicles out of service. He indicated he had stopped a P & T truck driven by Sean Fountain during that period and had had to place that truck out of service. He stated that based upon his experience and contact with P & T vehicles during the period January 1998 through April 1998 many of them were in unsafe condition and should not have been on the road. (TR 38-40)

John G. Apostoledes testified that he was born on May 31, 1950 and that he started working in the trucking industry as a driver in February 1982. He worked subsequently as a truck dispatcher, supervisor, operations manager and service manager. He became employed by P & T Container Co. in December 1997, after P & T was acquired by USA Waste. He was an operations manager for P & T and arrived at work about 4:30 A.M. Ordinarily, he left work for the day by 4:00 P.M. or 4:30 P.M. Another supervisor, Dave Hopping, arrived at work at 7:00 A.M. and remained there until all the trucks that were out for the day had returned. When a driver arrived at work in the morning he would get his VCR book, do a pre-trip inspection of his assigned truck, note any defects and bring any defects to his attention or to the attention of one of the mechanics. If a defect was severe and could not be corrected right away, the driver would be assigned another truck. P & T had a very strict safety policy and during the period at issue, January 1998 - April 1998, no driver for P & T was ever required to drive a truck he deemed to be unsafe. If he had required a driver to operate a truck after the driver had said that the vehicle was unsafe, he could have been fired. (TR 152-159)

John Apostoledes testified that on April 21, 1998 he arrived at work about 4:30 in the morning and left work for the day about 4:00 in the afternoon. He conversed with Sean Fountain that morning in the drivers' room. Sean told him he would not drive the first two trucks he assigned him to drive for doing his route that day because they were unsafe. Sean did drive the third truck assigned him, number 151, after doing a circle inspection of the vehicle. Sean did not indicate or say that he did not want to drive truck 151 that day. He did have a loud conversation with Sean Fountain that morning concerning productivity after one of the laborers refused to work with Sean because he would not get out of the truck to help with the loading of rubbish. He did not indicate to Sean Fountain on the morning of April 21, 1998 that he was terminated from employment at P & T. According to the company's policy and practice in effect at that time, if he had determined to discharge Sean Fountain the morning of April 21, 1998, Sean would have been paid by check on the spot for any money owed him and would have been escorted off P & T's property. If Sean Fountain had been terminated from employment the morning of April 21, 1998 he would absolutely not have allowed him to take a truck and drive it during the course of that day. Mr. Apostoledes said he left work at 4:00 o'clock that afternoon and did not see or speak with Sean Fountain on April 21, 1998 after they had had their conversations that morning. He expected Sean Fountain would come back to work the next day, April 22, 1998, and had a truck and shakers (laborers) waiting for him. Sean Fountain did not appear at P & T that day and he was told by one of the laborers that Sean was not coming back to P & T. Furthermore, he later found out that Sean Fountain had not finished the route assigned to him the day before (September 21, 1998). Trucks had to be sent to pick up what Sean had left uncollected the previous day. Mr. Apostoledes stated that he may have disciplined Sean Fountain for excessive absenteeism during the course of his employment at P & T. He said he never disciplined him for any reason related to mechanical operation of the vehicles. He testified that he did not terminate Sean Fountain on April 21, 1998. (TR 167-175)

David W. Hopping, a truck driver for Waste Management Inc., testified that he was a residential route supervisor for P & T Container during the period January 1998 - April 1998. He stated that it was his practice to arrive at work at P & T at 7:00 in the mornings when the men were already out on the streets. He would get an update from John Apostoledes as to who had what route and what was going on in general. Then, he would usually get into his service truck and head out on the streets about 7:30 A.M. He would stay out on the streets until about quarter to 5 or 5:00 o'clock in the afternoon when he would return to the P & T facility where he remained until all the trucks and men were in and the work accounted for. Usually he would leave work about 6:00 P.M. On the day in question, April 21, 1998, he encountered Sean Fountain out driving his route. They had a conversation during which Sean made no complaint about the truck he was driving being unsuitable but he did complain to him concerning John Apostoledes. Sean told him it was his last day on the job and that John Apostoledes had said to him he didn't need him any more. He did not think much of those remarks because he was accustomed to being told by up to ten men per day that they were through because the trash business is tough. He did not see or talk with Sean Fountain again that day. He got back to the P & T yard about 5:15 the afternoon of April 21, 1998. John Apostoledes was not there as it was his habit to leave work at 4:00 P.M. When he arrived at work the next morning he expected that Sean Fountain would be on the job. When he found out Sean had not come in to work that day he told John Apostoledes he guessed Sean had quit. He said he could not recall encountering or speaking with Sean Fountain at any time after that day. (TR 197-209)

Richard Forsyth, maintenance manager for Waste Management Inc., testified that he had occupied that same position at P & T Container during the period January 1998 - April 1998. He stated that during the time he was at P & T no driver was ever told to drive a truck that was unsafe. He said his review of the vehicle condition report (VCR) for truck 151 for April 21, 1998 indicates Sean Fountain had checked off some items but had made no comments regarding safety items. Mr. Forsyth stated that he had had a conversation with Sean Fountain before April 21, 1998 during which he had told Sean to be sure to write up all safety items. He testified that he was aware of no complaints about the operation of truck 151 before it went out on April 21, 1998 and that there was no call for road service from Sean Fountain that day. (TR 224, 225, 238-243)

Edward J. Crosby testified that he was born on June 12, 1959 and had worked for several companies in the waste industry over the years. He said he worked for the Canelas Company as a route driver for about ten years up to the time they were taken over by P & T in approximately January 1998. He continued working as a driver for P & T after the takeover and John Apostoledes was his supervisor. He stated that as of April 1998 Mr. Apostoledes' work schedule had him arriving at the P & T facility about 4:45 A.M. John Apostoledes would open the gate and the workers waiting would go into the office to punch in and be assigned their routes for the day. Mr. Crosby said John Apostoledes was always gone when he returned to the P & T facility from his daily routes. He testified that a driver was never told to drive a truck that he had written up as unsafe while he worked for P & T. Edward Crosby stated that he does not remember the date that Sean Fountain left P & T but that he does remember inquiring about Sean's whereabouts the day after at work. (TR 295-299) Mr. Crosby said John Apostoledes was a disciplinarian and very loud, used foul language at times and swore at the drivers. He stated that during the time he worked with Mr. Apostoledes he was unaware that he had ever required any driver to drive a truck that a driver had deemed to be

unsafe. (TR 309-311)

Michael Kevin Hughes, president of Regulatory Compliance Services, Inc., testified that his is a safety consulting company assisting primarily the transportation industry in achieving regulatory compliance and safe operations. He indicated that he has broad experience in safety management for many companies in the waste hauling industry. He said as president of Regulatory Services he consulted with waste companies, among them P & T, assisting them in compliance with OSHA, DOT and EPA regulations. He worked with John Apostoledes at P & T in the January - April 1998 time frame doing driver and mechanic safety meetings and assisting with insurance company safety inspections. He stated that at one of those safety training meetings, held on April 8, 1998, specifically for drivers both Sean Fountain and John Apostoledes were present. Mr. Hughes said that based on his observation and work, P & T was a safety conscious company during the period January to April 1998. He stated that P & T hired him to come in and assist them to be safe. He indicated P & T had a very low insurance rate and that they were looking to save money in that respect and were endeavoring to be regarded as a safe company to be identified for purchase and acquisition by USA Waste. (TR 313-322)

Conclusions of Law:

Sean Fountain, the Complainant, seeks relief pursuant to the provisions of the Surface Transportation Assistance Act (the Act) which prohibits the discharge of, or other discrimination against, employees who have engaged in certain protected activity. Section 31105(a)(1)(B)(i) provides:

No person shall discharge, discipline, or in any manner discriminate against an employee with respect to an employee's compensation, terms, conditions, or privileges of employment for refusing to operate a motor vehicle when such operation constitutes a violation of any Federal rules, regulations, standards or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or to the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident injury or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.

The Complainant alleges and has testified that he was discharged from his work as a trash truck driver for P & T Container Service on April 21, 1998. Mr. Fountain claims that his services for P & T were terminated by John Apostoledes, his supervisor, because he refused to drive two

unsafe trucks initially assigned to him by Mr. Apostoledes when he arrived at work the morning of April 21, 1998 and because of his history of making safety complaints and writing up safety deficiencies concerning trucks at P & T. John Apostoledes testified that he did not terminate Sean Fountain the morning of April 21, 1998 and that if he had fired Sean that morning he would not have permitted Sean to drive the truck he operated that day to do his assigned route (P & T truck number 151). John Apostoledes further testified, contrary to Mr. Fountain's testimony, that he did not see or speak with Sean Fountain after they had their morning conversation on April 21, 1998 and that he expected Sean would be reporting to work on April 22, 1998 and had a truck and laborers waiting for him that morning.

John Apostoledes' testimony was credible and convincing concerning his morning conversation with Sean Fountain on April 21, 1998. Furthermore, Mr. Apostoledes' testimony that he did not see or speak with Sean Fountain the afternoon of April 21, 1998 was credible, convincing and consistent with the testimony of co-workers, Edward Crosby and David Hopping, regarding John Apostoledes' work schedule and his having left the P & T facility when the men returned from doing their daily assigned routes that day.

A strong preponderance of the credible evidence of record indicates that the Complainant's employment as a truck driver for P & T Container Service was not terminated by John Apostoledes or any other individual of authority at P & T on April 21, 1998. Rather, the credible evidence of record indicates the Complainant abandoned his job with P & T on April 21, 1998 due to his dissatisfaction with the nature of the work and displeasure with the rough hewn management style of John Apostoledes. The evidence of record fails to establish that the Complainant was discharged, disciplined or otherwise discriminated against because of refusing to drive an unsafe vehicle while in the employ of P & T Container Service on April 21, 1998.

ORDER

For the above stated reasons, it is hereby ordered that the complaint of Sean Fountain under the Surface Transportation Assistance Act is dismissed.

LAWRENCE P. DONNELLY
Administrative Law Judge

DATED: September 23, 1999
Camden, New Jersey